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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-507

WILFRED KEYES, *et al.*,

Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the 10th Circuit.

BRIEF AMICUS CURIAE FOR SAN DIEGO UNIFIED SCHOOL DISTRICT.

Introduction.

This brief is filed with the written consent of both parties, pursuant to Rule 42 of the Rules of the Supreme Court of the United States. It is in support of the position of the Respondents, Denver School District, No. 1, *et al.*, that the Supreme Court should affirm the decision of the Court of Appeals which refused to order racial balancing of schools in the absence of proof that the racial imbalance was the result of racially motivated conduct.

Interest of Amicus Curiae.

For the past several years the San Diego Unified School District, like many other large northern city school districts,[1] has been struggling with some of the same conditions which are present in the *Denver* case. Over the past three decades the San Diego area has experienced a large influx of Negro and other minority group residents.[2] These new residents tended to congregate together in certain areas of the city, and as a result the neighborhood schools in some of those areas have a disproportionate number of minority students as compared to other areas of the city.[3]

Some of these minority students presented special educational problems. For example, some had come from other parts of the country where there were lower educational standards; others entered school with little English-language background, and many came from economically deprived families. In an attempt to alleviate many of these problems, the San Diego Unified School Board has formulated a plethora of compensatory and other educational programs[4]—all of which

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[1]The San Diego Unified School District is one of the largest urban school districts in the United States, serving some 128,317 pupils in its 33 secondary schools (grades 7-12) and 124 elementary schools (grades K-6).

[2]A review of the San Diego City Schools Pupil Racial Ethnic Census for the past several years illustrates this trend. In 1965-66 the figures for the three largest racial and ethnic pupil groups were as follows: Spanish Surname 8.0%, Other White 80.6%, and Negro 9.3%. By 1971-72 the respective figures were: Spanish Surname 10.6%, Other White 73.1%, and Negro 12.8%.

[3]The San Diego City School Pupil Ethnic Census, 1971-72 (Publ. Jan. 72) indicated that 21 of the District's 124 elementary schools and 5 of the District's 33 secondary schools had individual or combined Negro and Spanish Surname enrollments of 50% or more.

[4]Several of these programs (*E.g.*, The Fremont-Silvergate Model Schools Program and the Balboa Park Program) were

are designed to assure that each child has an equal educational opportunity no matter what his race, ethnic, economic or social background.

However, some individuals have not been satisfied with the School District's actions, and commencing in 1967 the San Diego School District has been almost continuously involved in litigation brought by various parties seeking to require the San Diego School District to adopt a policy of forced racial and ethnic balancing of its pupil population.[5]

By granting certiorari in the *Denver* case, for the first time the United States Supreme Court is in a position

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designed to provide an opportunity for pupils from various ethnic and socio-economic groups to come together for the purpose of developing mutual respect and understanding.

In addition, commencing in 1966, the San Diego School District initiated a voluntary ethnic transfer program with the school district paying all transportation costs. Each year participation in that program has increased, and in 1971-72 1,957 students took advantage of this program.

[5]In December 1967 a so-called "class action" suit seeking "integration" was filed. (*Carlin v. Board of Education, San Diego Unified School District*, San Diego Superior Court, No. 303800). In July 1969 that suit became inactive with the filing of a similar suit by the then California Attorney General, Thomas C. Lynch (*People v. San Diego Unified School District et al.*, San Diego Superior Court, No. 312080). Although the School District was successful in obtaining a dismissal of this latter suit, on appeal, the California Court of Appeals for the Fourth Appellate District reversed and remanded the case for trial (*People ex rel. Lynch v. San Diego Unified School District* (1971) 19 Cal.App.3d 252, 96 Cal. Rptr. 658). On November 11, 1971, following a denial of hearing by the California Supreme Court, the San Diego School District petitioned the United States Supreme Court for a writ of certiorari. On February 29, 1972, California's present Attorney General, Evelle J. Younger, replied to that petition by stating that he intended to dismiss the action. On March 27, 1972, the United States Supreme Court denied the petition for the writ of certiorari. (*San Diego Unified School District v. California* (1972) 405 U.S. 1016). On April 6, 1972, that case was dismissed, but within two weeks the original *Carlin* plaintiffs re-commenced their action, and at present, a trial is set for October 1972.

to decide what should be the respective role of the courts and the local school authorities in determining what should or must be done when racial imbalance, not the result of a prior *de jure* segregated system or prior discriminatory acts, exists. In this decision the San Diego Unified School District is vitally interested.

Opinions Below.

The Opinion of the Tenth Circuit Court of Appeals is reported at 445 F.2d 990 (App. Pet. Cert. 122a-158a). The various opinions of the District Court are reported at 303 F. Supp. 279 (App. Pet. Cert. 1a-19a); 303 F. Supp. 289 (App. Pet. Cert. 20a-48a); 313 F. Supp. 61 (App. Pet. Cert. 49a-98a); and 313 F. Supp. 90 (App. Pet. Cert. 98a-121a).

Jurisdiction.

The Supreme Court has jurisdiction to review the Tenth Circuit decision by a writ of certiorari pursuant to 28 U.S.C. Section 1254(1). This jurisdiction was invoked by the granting of said writ on January 17, 1972.

Question Presented for Review.

ARE SCHOOL AUTHORITIES REQUIRED TO RACIALLY BALANCE THEIR SCHOOLS REGARDLESS OF THE CAUSE OF THE IMBALANCE OR ARE THEY FREE TO ADOPT OTHER METHODS FOR PROVIDING EQUAL EDUCATIONAL OPPORTUNITY?

Statement of the Case.

In June 1969, the plaintiffs (petitioners herein) brought a "class action" against the Denver School District, its Board of Education, and Superintendent seeking broad injunctive relief to require defendants (respondents herein) to remedy the alleged racial seg-

regation and unequal educational opportunity in certain of defendants' schools.

Plaintiffs' complaint consisted of two causes of action. The first cause of action related to the so-called "resolution schools" consisting of six Northeast Denver elementary schools, two junior highs, and one high school affected by three resolutions adopted by the Board of Education in the spring of 1969 and thereafter in June 1969 rescinded. As to these schools, the trial court found affirmative discriminatory acts. (303 F. Supp. 289, at 294-295, App. Pet. Cert. 32a-35a; 313 F. Supp. 61, at 67-69, App. Pet. Cert. 52a-57a).

The second cause of action related to a larger number of Denver schools which plaintiffs alleged were either segregated or providing unequal educational opportunity. After finding that said schools were not *de jure* segregated, (313 F. Supp. 61, at 69-76, App. Pet. Cert. 57a-74a), nor that the neighborhood school policy had been intentionally used to segregate these schools, (313 F. Supp. 61, at 76-77, App. Pet. Cert. 74a-75a), the trial court proceeded to review a group consisting of twelve elementary schools, two junior high schools, and one senior high school. These "court designated schools" were generally located in the north-central part of Denver in what the court referred to as the "core aren" and were stated to have been selected because of their high (70% or more) concentration of Negro and "Hispanic" pupils.* (313 F. Supp. at 77, App. Pet. Cert. 76a-77a). The major thrust of the

*The court specifically noted that some of these schools had already been discussed in regard to the First Cause of Action, "but they are included here *because of their racial concentrations, if not in every instance their educational inferiority*". (313 F. Supp. 61, at 78, App. Pet. Cert. 77a). [Emphasis added.]

plaintiffs' claim as to these schools was that the racial concentration in those schools made them inferior, and thus the students attending them were denied equal educational opportunity. (313 F. Supp. 61, at 81, App. Pet. Cert. 83). Based primarily upon his conclusion that regardless of its cause, racially concentrated schools produce lower achievement and an inferior educational opportunity, (313 F. Supp. 61, at 77, 83, App. Pet. Cert. 76a, 89a), the trial court ordered that these "court designated schools" be "desegregated" and that grades 1-6 be racially balanced with an "Anglo" composition in excess of 50 percent. (313 F. Supp. 90, at 98, App. Pet. Cert. 116a).

On appeal the Tenth Circuit Court of Appeals, after affirming the other District Court findings, reversed as to the "court designated schools", holding that the trial court's ruling pivoted on a conclusion that Denver's neighborhood school policy violated the Constitution because it resulted in racial and ethnic imbalance and that this conclusion was contrary to the Tenth Circuit's previous holdings on this issue. (445 F.2d at 1007, App. Pet. Cert. 151a).

Thereafter the plaintiffs petitioned for a Writ of Certiorari to seek review of the Court of Appeals' decision. On January 17, 1972, the United States Supreme Court granted the writ of certiorari.

The brief of this Amicus will be limited to a discussion of the part of the case presented by the Circuit Court's reversal of the trial court.

Summary of Argument.

I.

The Tenth Circuit Court of Appeals correctly applied existing law when it reversed the trial court's ruling that pupil racial imbalance, regardless of its cause, results in a deprivation of equal educational opportunity. The decisions of the United States Supreme Court and every Federal Appellate Court which has considered the situation have indicated that there is no federal constitutional duty to racially balance the schools in the absence of proof that the inbalance was the result either of a prior *de jure* system, or purposeful discriminatory action.

II.

Recent empirical studies indicate that the problem of providing equal educational opportunity to minority students is very complex and that racial composition of the classroom, if at all related to achievement, accounts for only a small proportion of the differences among the schools. A very recent study indicates that racial balancing may not achieve the intended beneficial results and may, in fact, be counterproductive.

III.

In light of the problems presented by varying local conditions, the Supreme Court should not adopt one solution to the problem of providing equal educational opportunity, but should allow local school authorities the flexibility to work out their own solutions.

Argument.

I.

THE TENTH CIRCUIT PROPERLY RULED THAT ABSENT A PRIOR HISTORY OF SEGREGATION OR DISCRIMINATORY ACTS THERE IS NO CONSTITUTIONAL DUTY TO REMEDY PUPIL RACIAL IMBALANCE.

A. The Federal Circuit Courts of Appeal Have Uniformly Held That Absent a Prior History of Segregation or Other Discriminatory Acts, There Is No Constitutional Duty to Remedy Pupil Racial Imbalance.

Whenever Circuit Courts of Appeal have been faced with the issue of pupil racial imbalance in the absence of proof of prior discriminatory acts, they have reached consistent conclusions.[7] (*E.g. Bell v. School City of Gary, Indiana* (1963 7th Cir.) 324 F.2d 209, 213, *cert. denied* (1964) 377 U.S. 924 (no constitutional duty to change innocently arrived at school attendance districts merely because shifts in population had increased or decreased the percentage of Negro or white pupils); *Downs v. Board of Education* (1964 10th Cir.) 336 F.2d 988, 998, *cert. denied* (1965) 380 U.S. 914 (no requirement to abandon or destroy the neighborhood school system even though it results in racial imbalance where it was maintained with no intention or purpose to maintain or perpetuate segregation); *Springfield School Committee v. Barksdale*

[7]There has been a divergence of opinion in some trial courts. *E.g.*, compare *Blocker v. Board of Education of Manhasset, New York* (1964 E.D.N.Y.) 226 F. Supp. 208 and *Soria v. Oxnard School District* (1971 C.D. Cal.) 328 F. Supp. 155, with *Lynch v. Kenston School District Board of Education* (1964 N.D. Ohio) 229 F. Supp. 740 and *Gomperts v. Chase* (1971 N.D. Cal.) 329 F. Supp. 1191.

(1965 1st Cir.) 348 F.2d 261, 264 (no requirement to remedy racial imbalance at all costs); *Deal v. Cincinnati Board of Education* (1966 6th Cir.) 369 F.2d 55, 61, *cert. denied* (1967) 389 U.S. 847, (1969 6th Cir.) 419 F.2d 1387, 1390, *cert. denied* (1971) 402 U.S. 962 (no constitutional duty to bus children out of their neighborhoods or transfer classes, or select new schools to alleviate racial imbalance caused not by the school board but by the racial character of the neighborhoods in which the schools were located); see also, *Offermann v. Nitkowski* (1967 2nd Cir.) 378 F.2d 22, 24; *Sealy v. Dept. of Public Instruction of Penn.* (1958 3d Cir.) 252 F.2d 898, 901, *cert. denied* 356 U.S. 975.)

Thus in its decision in June, 1971, the Court in the Denver case could accurately state:

> *"We never construed Brown to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue.* [citations omitted]" (445 F.2d at 1005) [Emphasis added.]

The Circuit Court cases decided since *Denver* have continued to affirm its principles. (See *e.g. Lawlor v. Board of Education of the City of Chicago* (1972 7th Cir.) 458 F.2d 660 wherein the Court affirmed a trial court decision dismissing a complaint which alleged that the School Board's action had "forced whites to move out" and encouraged the segregation of "black people" within certain schools, stating:

> "If separation in racially imbalanced schools were the result of unlawful discrimination, school officials would be under an affirma-

tive duty to remedy the situation. However, the mere fact of imbalance of races is not alone a deprivation of equality of educational opportunity in the absence of purposeful invidious discrimination." (458 F.2d at 662).

Thus, since *Brown*, every Federal Appellate Court which has been directly confronted with the issue of racial imbalance has held that there is no constitutional duty to remedy pupil racial imbalance when it is not the product of some prior action of segregation or purposeful discrimination.[8]

B. Recent Supreme Court Decisions Indicate That Racial Imbalance Existing in a Unitary School System Does Not Require Judicial Interference in the Absence of a Finding of Specific Discrimination.

Within the last year the United States Supreme Court on three different occasions has expressed agreement with the principle that racial imbalance *per se* is not unconstitutional.

1. *The Charlotte Case*

In *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, the Court illustrated that point in dealing with a case from a former dual school system. The Court upheld the power of a federal district judge to use "cross-busing", "pairing", and "grouping" techniques to remove the last vestiges of a dual

[8]The remedying of racial imbalance has been ordered by some of these same Circuit Courts where there was a specific finding that it was the result of purposeful discrimination. (See *e.g., Davis v. School District City of Pontiac* (1971 6th Cir.) 443 F.2d 573, *cert. denied* 404 U.S. 913; *United States v. School Dist. 151 of Cook County, Illinois* (1970 7th Cir.) 432 F.2d 1147, *cert. denied* (1971) 402 U.S. 943).

school system.[9] In addition, however, the court laid down the following guidelines:

(a) *A Unitary School Need Not Be Racially Balanced.*

The appellant school board argued that the District Court order imposed a racial balance requirement of 71%-29% for each of its individual schools. The Supreme Court disagreed.[10] It saw the use made of mathematical ratios as no more than a starting point and thus within the District Court's "discretionary powers, an equitable remedy for the particular circumstances". (402 U.S. at 25.)

Moreover the Supreme Court stated:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach

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[9]In accordance with *Brown* and the Supreme Court's later implementation decision (*E.g., Brown v. Board of Education of Topeka* (1955) 349 U.S. 294 (requiring all deliberate speed); *Griffin v. County School Board of Prince Edward County* (1964) 377 U.S. 218 (prohibiting the closing of public schools to avoid desegregation); *Green v. County School Board* (1968) 391 U.S. 430 (holding freedom of choice plans an unacceptable substitute for desegregation) racial imbalance has been ordered remedied by several Southern courts in an attempt to create a unitary school system where none existed previously and wipe out the last vestiges of state imposed segregation. (*See e.g., United States v. Jefferson County Board of Education* (1966 5th Cir.) 372 F.2d 836, *affirmed en banc* (1967 5th Cir.) 380 F.2d 385, *cert. denied* 389 U.S. 840; *Hobson v. Hansen* (1967 D.D.C.) 269 F. Supp. 401, *remanded sub nom. Smuck v. Hobson* (1969 D.C.Cir.) 408 F.2d 175).

[10]The Supreme Court noted that the District Court itself had stated: " 'This court has not ruled, and does not rule that "racial balance" is required under the Constitution . . . *nor that the particular order entered in this case would be correct in other circumstances not before this court*' (emphasis in original)." (402 U.S. at 25n.9.)

would be disapproved and we would be obliged to reverse. *The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.*" (402 U.S. at 24.) [Emphasis added.]

(b) *A Unitary School System May Have "One-Race" or Virtually "One-Race" Schools.*

The court stated:

> "No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition." (402 U.S. at 26.)

However, the Supreme Court noted that in certain metropolitan areas minority groups are often concentrated in one part of the city and stated:

> "In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law." (402 U.S. at 26.)

(c) *There Is No Duty to Racially Balance Schools in the Absence of a Constitutional Violation.*

The Supreme Court held that where there is a dual school system a court has broad remedial powers including the right to take such drastic steps as "gerry-

mandering" of school attendance zones and "pairing" or "grouping".

The Court noted, however:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." (402 U.S. at 28.)

(d) *Establishment of a Unitary School System Satisfies Constitutional Requirements.*

In conclusion the Supreme Court stated:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown* I. The systems will then be unitary in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but *in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to*

affect the racial composition of the schools, further intervention by a district court should not be necessary." (402 U.S. at 31-32) [Emphasis added.]

2. *Spencer v. Kugler*

Although the *Charlotte* case factually involved a former state segregated school system, many thought that its teachings would have applications to all courts, both north and south. This forecast seemed justified by the United States Supreme Court's handling of the case of *Spencer v. Kugler* (1971 D.N.J.) 326 F. Supp. 1235. In that case, a three judge Federal Court held that a complaint which sought inter-district pupil racial balancing did not state a claim upon which relief could be granted. Although the Court reached its decision before publication of the *Charlotte* decision, in its written opinion the Court reviewed the *Charlotte* case and noted that it fully supported the Court's disposition of the plaintiffs' claims. (326 F. Supp. at 1241-1243.)

The plaintiffs appealed and the United States Supreme Court affirmed *per curiam,* (1972) 404 U.S. 1027.

3. *Wright v. Council of City of Emporia*

In the very recent decision of *Wright v. Council of City of Emporia, Virginia,* 40 U.S.L.W. 4806 (U.S. June 22, 1972) the Supreme Court was again faced with a situation arising from a former state segregated school system. Soon after a Federal District Court had ordered a "pairing" plan for the Greens-

ville County School District, the City of Emporia tried to withdraw from the County System and operate its own school system. Although the majority of the Court found that under the circumstances this withdrawal would impede the dismantling of the former dual school system, they were careful to point out that their decision was not based upon any racial balancing concept. The opinion stated:

> "We need not and do not hold that this disparity in the racial composition of the two systems would be a sufficient reason, standing alone, to enjoin the creation of a separate school district. The fact that a school board's desegregation plan leaves some disparity in racial balance among various schools in the system does not alone make that plan unacceptable. We observed in *Swann, supra* that 'the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. 402 U.S. at 24.'" (40 U.S.L.W. at 4810-4811.)

The Supreme Court's consistent language and treatment of these three recent cases indicates that in dealing with a unitary school system the fact of racial imbalance alone does not give a court the right to interfere and order that it be remedied.

II.

RECENT EMPIRICAL EVIDENCE OFFERS NO EXCUSE FOR CHANGING THIS RULE.

In *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483 the Supreme Court in overruling the "separate but equal" doctrine of *Plessy v. Ferguson* (1896) 163 U.S. 537 was able to cite several sociological and psychological treatises for the proposition that:

> "Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." (347 U.S. at 494.)

Plaintiffs and others have emphasized this finding and would have the Supreme Court blindly extend it to all cases where pupil racial imbalance exists regardless of cause. In support of this contention in the Denver case, they pointed to the low average achievement scores of the "court designated" area schools and leaped to the conclusion that only by racially balancing these schools will the minority students receive equal educational opportunity.

Whatever may have been the extent of sociological and psychological knowledge in 1954 as applied to the effects of segregated school systems on minority pupils, today we know that the problem of providing equal educational opportunity to minority groups is very complex and is not dependent upon just one factor such as the racial proportions in a school or classroom.

A. The Coleman Report and Later Studies of Recent Data Indicate That the Racial Composition of a School Has Little Effect on the Educational Achievement of the Students.

In July, 1966, the COLEMAN REPORT was published.[11] Its results were startling and questioned some of the basic assumptions hitherto prevalent in the field of education. Contrary to what the investigators thought they would find, the survey indicated that minority schools, even in the south, did not differ substantially in physical facilities (COLEMAN REPORT pp. 9-11) and that what differences were shown did not relate closely to achievement (COLEMAN REPORT p. 312). The key factor in predicting achievement appeared to be the socio-economic background of the students (COLEMAN REPORT pp. 21, 302).

Although the report found higher achievement in schools with a high proportion of white students, it noted:

> ". . . The apparent beneficial effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background and higher educational aspirations that are, on

[11]The Civil Rights Act of 1964 provided that the United States Office of Education should undertake a survey and report within two years concerning the lack of availability of equal educational opportunities by reason of race, color, religion, or national origin in the public schools (42 U.S.C. 2000 c-1). The Commissioner of Education entrusted the operation to a team headed by James S. Coleman of Johns Hopkins University. Initially a massive survey was undertaken involving some 570,000 school pupils, 60,000 teachers, and information on the facilities available in over 4,000 schools. This massive study was published in two parts, the REPORT ON EQUALITY OF EDUCATIONAL OPPORTUNITY, [EEOR—often called the COLEMAN REPORT], and a Supplemental Appendix containing a part of the survey data [EEOS] upon which the report was based.

> the average, found among white students. The effects of the student body environment upon a student's achievement appear to lie in the educational proficiency possessed by that student body, regardless of its racial or ethnic composition." (COLEMAN REPORT pp. 307-310).

More recently there have been some independent reanalyses of some of the survey data included in the COLEMAN REPORT. See Cohen, *Defining Racial Equality in Education* (1969) 16 UCLA Law Review 255, who states that on the basis of his analysis of the earlier data he has concluded that:

> ". . . if recent research is correct, racial composition—if at all related to achievement—accounts for only a small proportion of school-to-school performance differences among blacks. The research seems to show that other measures of school resources are more important than racial composition, but it also seems to show that all of these factors are of almost negligible importance to achievement; family background, social and economic status, and community characteristics appear to be by far the most important predictors of achievement in school. None of these are elements over which schools have traditionally had much control." (16 UCLA L.Rev. at 258-259).

In March 1972, a series of 14 papers derived from a Harvard University Faculty Seminar analyzing the COLEMAN REPORT and its data were published in a volume entitled ON EQUALITY OF EDUCATIONAL OPPORTUNITY edited by Frederick Mosteller and Daniel P. Moynihan [hereinafter cited as MOSTELLER].

After analyzing the COLEMAN REPORT and commenting upon its finding regarding the general equality of school facilities and the new emphasis on non-school factors, the editors commented:

> "In this respect the EEOR was part of a generally new phenomenon which was unsettling both to the advocates of social change and to the analysts of social conditions. Especially with respect to matters of race, the period of the EEOR, which is to say the mid-1960's, had been preceded by a half century, at very least in which social science had been the unfailing ally of social change in this field. Not infrequently social scientists had been advocates as well as analysts, and there had been little if any tension between their dual roles. Social science had come to the aid of the widest range of causes, and not least that of educational equality. A distinctive feature of *Brown v. Board of Education of Topeka* had been the introduction by the plaintiffs of social science information purporting to prove that segregated schools were inherently unequal, and that the disadvantage was sustained by the Negro children. What then was to be made of social scientists apparently turning on their old allies with a report that implied that this was all greatly exaggerated, *and that the low levels of educational achievement came from generalized social conditions against which schools could hardly expect to prevail, save in the most marginal ways?*" (MOSTELLER p. 31) [Emphasis added.]

The papers themselves tended to support the COLEMAN REPORT findings.

In "The Coleman Report and the Conventional Wisdom" Professor Christopher H. Jencks concentrated his efforts in analyzing the data from northern urban elementary schools. Among his conclusions was the following:

> "The achievement of lower-class students, both black and white, was fairly strongly related to the socio-economic level of their classmates. This usually meant that a student's achievement was also related to the race of his classmates, since blacks' classmates tended to be poor classmates and vice versa. If the socio-economic level of a lower-class child's classmate was held constant, however, their race had no relationship to his achievement." (MOSTELLER p. 71).

Professor David J. Armor in his paper "On School and Family Effects on Black and White Achievement: A Re-examination of the USOE Data" found:

> "The results are strongly suggestive of the conclusion that the determinants of student achievement are more likely to be found in the home than in the school." (MOSTELLER p. 224).

After examining the data gathered in regard to the achievement of blacks in integrated schools he concluded:

> "In other words, even those black students in integrated and higher socio-economic environment still achieved at a lower level than whites. The most likely explanation for this is that their *individual family background* is still more disadvantaged than that of white students in the same environment. Thus, while integration may

be an important factor for black achievement, blacks might still never attain full achievement equality until their individual family life style catches up to that of whites. The policy implication here is that programs which stress financial aid to disadvantaged black families may be just as important, if not more so, than programs aimed at integrating blacks into white neighborhoods and schools." (MOSTELLER p. 226).

Professors David K. Cohen, Thomas F. Pettigrew, and Robert T. Riley in their paper entitled "Race and the Outcomes of Schooling" studied the effect of racial composition in the sixth grade of northern metropolitan schools. They concluded:

"Our findings on the school racial composition issue, then, are mixed. Although the initial EEOS analysis overstressed the impact of school social class, it would not be profitable to perform a complete reanalysis at both the school and student level at grades nine and twelve given the problems of unmeasured school selection processes. When the issue is probed at grade six, a small independent effect of schools' racial composition appeared, but its significance for educational policy seems slight. The evidence suggests that student body racial composition at grade six acts more as a 'proxy' than a 'mediator' of the school social-class effects. *Until the breadth of the EEOS data can be combined with sufficient longitudinal information on students and their schools, stronger results on this point will not be forthcoming.*" (MOSTELLER pp. 351-352). [Emphasis added.]

B. New Evidence on the Effects of Integration Raise Serious Questions About the Advisability of a Court Imposed Program of Racial Balancing.

Very recently one of the first longitudinal studies on the effects of racial composition in the schools[12] has been published by Professor Armor in an article entitled "The Evidence on Busing" appearing in the Summer 1972 issue of a magazine called THE PUBLIC INTEREST [hereinafter cited as ARMOR].

Professor Armor's findings were based on the study of data collected over the past five years from several voluntary integration programs in five northern cities (Boston, Massachusetts; White Plains, New York; Ann Arbor, Michigan; Riverside, California; and Hartford, Connecticut).

His purpose in collecting the data was to determine if in fact integration had a positive effect for Black students. His findings were as follows:

1. *Achievement.*

"None of the studies were able to demonstrate conclusively that integration has had an effect on academic achievement as measured by standardized tests. Given the results of the Coleman study and other evaluations of remedial programs (e.g., Head Start), many experts may not be surprised at this finding. To date

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[12]To a certain extent Professor Armor's studies had been forecast by St. John, the Relation of Racial Segregation in Early Schooling to the Level of Aspiration and Academic Achievement of Negro Students in a Northern High School, a 1962 thesis presented to the Faculty of the Graduate School of Education of Harvard University. The unexpected results of that study were summarized in Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem* (1963) 58 Nw. U. L. Rev. 157, 202-203.

there is no published report of *any* strictly educational reform which has been proven substantially to affect academic achievement; school integration programs are no exception." (ARMOR p. 99)

2. *Aspiration and Self-Concept.*

"In the METCO study [Boston] we found that there were no increases in educational or occupational aspiration levels for bused students . . . on the contrary, there was a significant decline for the bused students, from 74 per cent wanting a college degree in 1968 to 60 per cent by May 1970. (ARMOR p. 101).

3. *Race Relations.*

"One of the central sociological hypotheses in the integration policy model is that integration should reduce racial stereotypes, increase tolerance, and generally improve race relations. Needless to say, we were quite surprised when our data failed to verify this axiom. Our surprise was increased substantially when we discovered that in fact, the converse appears to be true. The data suggest that, under the circumstances obtaining in these studies, integration heightens racial identity and consciousness, enhances ideologies that promote racial segregation, and reduces opportunities for actual contact between the races." (ARMOR p. 102).

4. *Long-term Educational Effects.*

". . . [T]here does seem to be some strong evidence that middle-class suburban or prep schools have an important "channeling" effect not found in black schools. The effect is prob-

ably due to better counseling and better contacts with college recruiting officers. Whatever the reason, black students attending such schools may have doors opened for them that are closed to students attending predominantly black schools. Given the lack of positive effects in other areas, these findings may have great significance for future busing programs, and further research is urgently needed." (ARMOR p. 106).

5. *Program Support.*

"We must conclude that the busing programs we have reviewed seem to have considerable support from both the black and white communities. In most cases, black parents were highly supportive of the various busing programs. Like the students in our own study, black parents stressed quality education as the most important benefit of such programs, whereas white parents in receiving schools tended to stress the experience of coming into contact with other races. We must point out, however, that *none* of the programs reviewed involved *mandatory* busing of white students into black communities; cities facing this situation might present a very different picture of white support. Moreover, it is unlikely that many in the black community have seen the data on achievement reported here; much black support may be based upon premises regarding academic gain which our findings call into question. Whether or not black support will be affected by such findings remains to be seen." (ARMOR p. 107).

Professor Armor then concluded:

"It seems clear from the studies of integration programs we have reviewed that four of the five major premises at the integration policy model are not supported by the data, at least over the one-to-five-year periods covered by various reports. While this does not deny the possibility of longer-term effects or effects on student characteristics other than those measured, it does mean that the model is open to serious question." (ARMOR p. 109).

6. *Policy Implications.*

In regard to policy implications he stated:

"The most serious question is raised for mandatory busing (or induced integration) programs. If the justification of mandatory busing is based upon an integration policy model like the one we have tested here, then that justification has to be called into question. The data do not support the model on most counts. There may be justifications for school integration other than those in the integration policy model, but then the burden must fall upon those who support a given school integration program to demonstrate that it has the intended effects (with no unintended negative side-effects). It also must be demonstrated that any such program is at least supported by the black community." (ARMOR p. 114).

III.

IN THE ABSENCE OF PROOF OF CONSTITUTIONAL VIOLATIONS LOCAL SCHOOL AUTHORITIES SHOULD BE ALLOWED TO FORMULATE THEIR OWN SOLUTIONS TO THE PROBLEM OF PROVIDING EQUAL EDUCATIONAL OPPORTUNITY.

If our educational system is to work, solutions to the problems of providing equal educational opportunity must come not from the Courts, but from those best equipped to resolve these questions: The members and staff of the State Boards of Education, the local Boards, and the professional local Administrators. This is a teaching of the Court in *Deal v. Cincinnati Board of Education* (1966 6th Cir.) 369 F.2d 55:

> "In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to read *Brown* in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice." (369 F.2d at 61.)

Chief Justice Burger made similar pronouncements while still a Circuit Judge. In the course of his dissent in *Smuck v. Hobson* (1969 D.C. Cir.) 408 F.2d 175 he made the following statement:

> "Several commentators have expressed views which undergird what Judge Danaher [another dissenting Judge] has said as to the need for

> caution and restraint by judges when they are asked to enter areas so far beyond judicial competence as the subject of how to run a public school system. We have little difficulty taking judicial notice of the reality that most if not all of the problems dealt with in the District Court findings and opinion are, and have long been, much debated among school administrators and educators. There is little agreement on these matters, and events often lead experts to conclude that views once held have lost their validity." (408 F.2d at 196.)

The above statement is particularly appropriate in the instant case where as a result of some of the recent empirical studies established views may in fact have to be subject to an "agonizing reappraisal".

There is no dispute that there is a problem in providing equal educational opportunity to minority students. The question is how to solve it. The plaintiffs in *Denver* want this Court to adopt one solution. Many educators, even before Armor's study, were not so sure that plaintiffs' solution of racial balancing would be an instant panacea. They questioned if there really is a causal relationship between racial imbalance and the low achievement of minority students or if the low achievement is not caused by other factors, some beyond the ability of the school to remedy. This is not to say that the schools should give up—but it certainly means that the schools have a great deal of experimenting to do before they can be sure how to best allocate their limited resources to solve this problem.

Mosteller and Moynihan reached a similar conclusion when they wrote:

> "The nation has acquired a goal, or, if it has not, we think it should accept it—equal educational opportunity defined as approximately equal distributions of achievement (but not just for cognitive skills) for the different ethnic/racial groups. *This is a goal it does not know how to attain.* Given a vital, prosperous, and still largely optimistic society, it follows that a period of fairly intensive educational experimentation and research is in order—and is likely to occur." (MOSTELLER p. 45). [Emphasis added.]

With these thoughts in mind the court should allow the local school boards flexibility to experiment and not bind them to just one solution.

Conclusion.

For many years the United States Supreme Court has focused its efforts on implementing the *Brown* decision in areas which had a former dual school system. Now for the first time, it has before it the question of pupil racial imbalance arising in areas where there was no state imposed segregation.

In this latter situation the court should not leap to the conclusion that the same methods necessary to remove the last vestiges of racial segregation are required where pupil racial imbalance exists in a unitary school system. At least until it gains more familiarity in this field, the court should adopt a case by case approach

and attempt to allow local authorities a chance to solve this problem before mandating one solution.

In this situation the court should more than ever reaffirm as its policy and as the policy for lower federal courts its pronouncement in *Swann v. Charlotte-Mecklenburg Board of Education, supra:*

> "[I]t is important to remember that judicial powers may be exercised only on the basis of a Constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults."
>
> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad *discretionary* powers of school authorities; *absent a finding of constitutional violation, however, that would not be within the authority of a Federal Court.*" (402 U.S. at 16) [Emphasis added.]

The court should avoid the "educational thicket" and affirm the decision of the Court of Appeals which refused to order racial balancing of schools in the

absence of proof of a prior *de jure* system or specific discriminatory acts.

Dated July 24, 1972.

Respectfully submitted,

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